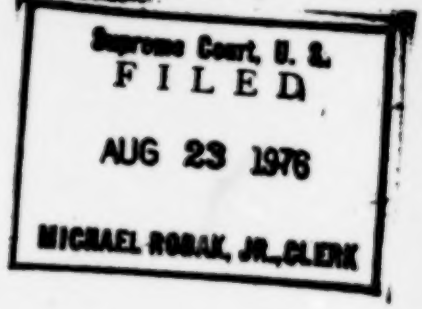
IN THE

Supreme Court of the United States

OCTOBER TERM, 1976



No. 75-6297

RAMON MARTIN FIALLO, etc., *et al.*,

Appellants,

v.

EDWARD H. LEVI, individually and as Attorney General of the United States, *et al.*,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the divided three-judge District Court for the Eastern District of New York is reported at 406 F. Supp. 162.

JURISDICTION

By judgment entered on December 1, 1975, a divided three-judge District Court of the Eastern District of New York, convened pursuant to 28 U.S.C. §§2282 and 2284, granted judgment for the defendants and dismissed plaintiffs' action challenging the constitutionality of statutory provisions of the Immigration and Nationality Act. The Notice of Appeal to this Court was timely filed by the plaintiffs on December 31, 1975. The Jurisdictional Statement was filed in this Court on March 1, 1976. On June 7, 1976, this Court noted probable jurisdiction over the appeal.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional validity under the First, Fifth, and Ninth Amendments to the United States Constitution of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §201(b) (8 U.S.C. § 1151(b)) and Immigration and Nationality Act §212(a)(14) (8 U.S.C. §1182(a)(14)). The verbatim text of these Constitutional provisions and statutes is set forth in Appendix A to this brief.

QUESTION PRESENTED

Whether the provisions of the Immigration and Nationality Act which define "parent" and "child" unconstitutionally discriminate, in violation of the First, Fifth, and Ninth Amendments to the United States Constitution, against United States citizen and legal permanent resident illegitimate children and fathers of illegitimate children, and their alien fathers and children, by denying them, solely on the basis of the gender of the parent and the illegitimate birth status of the child, the procedural due process opportunity afforded to other United States citizens and permanent residents and their alien parents and children to establish the existence of their family relationship, and as a result abriding their constitutionally fundamental interests in family association and a life together in this country and in the privileges of their citizenship and residency.

STATEMENT OF THE CASE

A. Statutory Scheme

Generally, an alien seeking to enter the United States as a legal permanent resident must satisfy restrictive numerical quota and labor certification requirements.[1]

[1] Immigrants from independent Western Hemisphere countries are admitted on a "first come-first serve" basis subject to an annual numerical quota for the entire Western Hemisphere. Immigration and Nationality Act of October 3, 1965, Sec. 21(e), P.L. 89-236, 79 Stat. 921. Immigrants from Eastern Hemisphere countries are subject to separate annual numerical quotas from each country, which are allocated by statute among seven preference categories. A non-preference immigrant can obtain an *(continued)*

However, if their family relationship is included within the definitions of "parent" and "child" under the Immigration and Nationality Act, a United States citizen parent is entitled to have his alien child exempted from the numerical quota and labor certification requirements and a United States citizen or legal permanent resident child is entitled to have his Western Hemisphere alien parent exempted from the labor certification requirement. Immigration and Nationality Act (INA) §§101(b)(1) and (2), 201(b), 212(a)(14) (8 U.S.C. §§1101(b)(1) and (2), 1151(b), and 1182(a)(14)).

A United States citizen is allowed the entry of his "immediate relative" without regard to either any numerical quota or a labor certification. INA §§201(b), 212(a)(14) (8 U.S.C. §§1151(b), 1182(a)(14)) An immediate relative is defined as the child, parent or spouse of a United States citizen. INA §201(b) (8 U.S.C. §1151(b)) Without "immediate relative" status, the citizen's child, if from the Western Hemisphere, is subject to a general quota and, if from the Eastern Hemisphere, is considered a non-preference immigrant. A non-preference immigrant can enter this country only when there is an available quota number not used within the seven preference categories. INA

(footnote continued from preceding page)
immigrant visa only when there is an available quota number not used within one of the seven preference categories. INA §§202(a), 203 (8 U.S.C. §§1152(a), 1153) Immigrants from colonies of Eastern Hemisphere countries, even though located in the Western Hemisphere, are subject to annual numerical quotas from the colonies which are allocated on the preference system. In addition to meeting the numerical quota requirements, all such immigrants must obtain labor certifications. See footnote 2, *infra*.

§203(a)(8) (8 U.S.C. §1153(a)(8)) Thus, unless a United States citizen parent and alien child can attain the status of "parent" and "child" under the Act, they realistically are rendered unable to live together in this country.

A United States citizen or legal permanent resident "child" is given the statutory right to have his Western Hemisphere "parent" exempted from the labor certification requirement. Where required, a labor certification will be given only if the Secretary of Labor has certified to the Secretary of State that the specific job that the alien will perform in the United States is in short supply and that his employment will not adversely affect the wages and working conditions of United States workers. INA §212(a)(14) (8 U.S.C. §1182(a)(14)) A labor certification is not given at all for a great number of jobs and is extremely difficult to obtain even for those jobs for which the certification is available.[2] Thus, unless a United States citizen or

[2] A person seeking a labor certification must submit his job qualifications to an immigration or consular official. The Secretary of Labor has by regulation compiled a list of many jobs for which a labor certification will never be given. 29 C.F.R. §§60.2(2), 60.7, Schedule B. The Secretary of Labor has also established a list of jobs in certain occupations, such as those which require an advanced degree in a medically related field or involve certain religious professions, for which a labor certification may be granted if the alien establishes to the satisfaction of an immigration or consular official that he meets the particular qualifications. 29 C.F.R. §§60.2(2), 60.7, Schedule A. Persons qualified for work in any other job category for which a labor certification can be given must have a specific job offer from an employer in the United States. 29 C.F.R. §60.3(c). The Department of Labor must then gather the appropriate evidence and certify that the specific job that the alien will perform in the United States is in short supply and will not adversely affect the wages or working conditions of persons presently in the United States. INA §212(a)(14) (8 U.S.C. §1182(a)(14))

permanent resident child and his alien father are able to attain the status of "child" and "parent" under the Act, they realistically are rendered unable to live together in this country.

Included in the definition of "child" and "parent" are a legitimate child and either parent, whether married, divorced, or separated, a legitimated child and either parent, a stepchild and stepparent, an adopted child and his adoptive parent, an orphaned child and his adoptive or prospective adoptive parent, and an illegitimate child and his mother. Not included in the definition of "child" is an illegitimate child in relationship to his father. Not included in the definition of "parent" is the father of an illegitimate child.

Those United States citizen or legal permanent resident parents and children and their alien children or parents who claim to have a relationship covered by the statutory definition of parent and child are given the opportunity for an individualized determination of their family relationship before the Immigration and Naturalization Service and a United States Consul of the Department of State. In all cases, the citizen or resident and the alien relative must prove their relationship to the satisfaction of immigration and consular officials. INA §§204, 221(a) and (g), 224, 291 (8 U.S.C. §§1154, 1201(a) and (g), 1204, 1361) On the other hand, any United States citizen or permanent resident and alien relative who claim the relationship of illegitimate child in relation to his unwed father are denied any opportunity to prove their family relationship and thus to achieve the status without which they realistically are unable to live together in this country. Accordingly, a United States citizen father or a United States citizen or permanent resident child is precluded

by the restrictive definition of "parent" and "child" from living together in this country with his alien child or father.

B. Facts

The following factual allegations of the plaintiffs in this case were not disputed below by the Government and were substantially made findings of fact by the District Court. (A at 53)[3] The plaintiffs are a United States citizen father and his alien child, a United States citizen child and his alien father, and two United States legal permanent resident children and their alien father.

1. Cleophus Rupert Warner and Serge Patrick Warner

Cleophus Rupert Warner became a naturalized citizen of the United States in 1966. (A at 31, 36) His son, Serge Patrick Warner, was born on February 23, 1960 in the French West Indies. (A at 31, 36) Shortly after the birth of his son, Cleophus Warner registered as his father in the French West Indies and acknowledged paternity, and his name appears on Serge's birth certificate.[4] (A at 31, 36) Cleophus Warner has never

[3] References to the Appendix are denominated "A".

[4] A true and accurate copy of this birth certificate is attached as Exhibit D to plaintiffs' Statement pursuant to local District Court Rule 9(g), which was submitted in support of plaintiffs' motion filed in the District Court on August 8, 1975 for class action certification, summary judgment, and permanent injunction.

been married to Serge Patrick Warner's natural mother, Elenore Carmelie Gibs. (A at 31, 36) Both in the French West Indies and in the United States, Mr. Warner worked and supported and maintained his son from his birth until the present time, and he intends to continue to do so in the future. (A at 31, 37)

Serge Warner entered the United States as a visitor on August 22, 1969, solely for the purpose of visiting his father. (A at 31, 37) Shortly after his arrival in this country, his mother wrote to Mr. Warner from outside the United States to inform him that she had married, was moving to a new undisclosed address and did not want their son returned to her. (A at 31, 37) Thus, Serge Warner cannot be legitimated, since under applicable law legitimation can occur only by marriage of the parents.[5] (A at 31, 37)

Mr. Warner filed a Form I-130, "Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa" with the Immigration and Naturalization Service in New York City as the proper preliminary step for obtaining an immigrant visa and permanent resident status for an unmarried child under twenty-one of a United States citizen. (A at 32, 37) In a decision[6] dated March 4, 1972 the petition was rejected as mandatorily deniable under INA §101(b) (8 U.S.C. §1101(b)) because Serge Warner was not the legitimate or the legitimated issue of Cleophus Warner. (A at 32,

[5] *Matter of Julianus*, Board of Immigration Appeals (BIA) Interim Decision #2227 (September 14, 1973) (law of Guadaloupe, French West Indies); New York Domestic Relations Law §24 (McKinney Supp. 1975).

[6] Attached as Exhibit E to plaintiffs' Statement pursuant to Rule 9(g). See footnote 4, *supra*.

37, 48) Mr. Warner also attempted to obtain permanent resident status for his son Serge by writing to the United States Consul in the French West Indies. (A at 32, 37) In response, he was informed that he must obtain an approved I-130 Petition before the Consul could take any action. (A at 32, 37)

Although there is an exclusion proceeding presently pending against him, the Government has agreed, pending the outcome of this case, to permit Serge Warner to continue to reside with his father in Queens, New York. (A at 31, 37) There his father continues to support and maintain him. (A at 31, 37, 38) Both Cleophus and Serge Warner desire that Serge remain in the United States to live with his father. (A at 32, 37, 38) However, he is effectively precluded from doing so because without immediate relative status Serge must satisfy the restrictive numerical quota and labor certification requirements which he realistically cannot meet.

2. Ramon Martin Fiallo and Ramon Augusto Rafael Fiallo-Sone

Ramon Martin Fiallo is a five-year-old citizen of the United States born in New York, New York on January 2, 1971 (At at 28, 33, 35) His natural parents are Celia Francisca Michel Rodriguez and Ramon Fiallo-Sone. (A at 28, 33, 35) The father's name appears on his son's birth certificate.[7] (A at 28, 33) While his mother was

[7] A true and accurate copy of this birth certificate is attached as Exhibit A to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra*. On the birth certificate, the mother's name appears incorrectly as Celia Fiallo.

working and supporting Ramon Jr., his father assumed, from the time of Ramon's birth, the role of primary caretaker of and constant companion to his son. (A at 28, 34, 35) Thus, Ramon Jr. is very dependent upon and attached to his father. (A at 28, 35) For personal reasons, Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez have never married. (A at 28, 34, 35) Both of Ramon's parents want their son to be raised in the United States so that he can obtain the full benefits of his citizenship. (A at 34, 35) Ramon's mother feels that it is in her son's best interest to live with his father because Ramon is dependent on Mr. Fiallo. (A at 28, 35)

Ramon Fiallo-Sone is a citizen of the Dominican Republic. (A at 34) A "Preliminary Questionnaire to Determine Immigrant Status"[8] was submitted on his behalf to the United States Consulate in the Dominican Republic as the proper preliminary step in obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one. (A at 39, 34, 47) Consul Catherine M. Hurley rejected and returned the questionnaire together with a letter[9] stating that Ramon Fiallo-Sone was not eligible for an immigration visa and permanent resident status without a labor certification since his citizen son was not his legitimate issue. (A at 29, 34, 46) Under applicable law, Ramon Martin Fiallo cannot be legitimated other than by marriage of his parents, who have chosen not to marry.[10] Ramon

[8] Attached as Exhibit C to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra.*

[9] Attached as Exhibit B to plaintiffs' Rule 9(g) Statement. See footnote 4, *supra.*

[10] *Matter of Doble-Pena*, 13 I&N Dec. 366 (BIA 1969) (law of the Dominican Republic); New York Domestic Relations Law §24 (McKinney Supp. 1975).

Martin Fiallo, a citizen of the United States, was thereby denied the statutory right of having his father deemed eligible on the basis of their father-son relationship for an immigration visa and permanent resident status, without having to obtain a labor certification. (A at 29, 34) In the past, Mr. Fiallo has sought and been unable to obtain a labor certification. (A at 28-29)[11]

3. Trevor Aston Wilson, Earl Antonio Wilson, and Arthur Cecil Wilson

Trevor and Earl Wilson, permanent residents of the United States, were born in Jamaica on June 19, 1957 and January 6, 1959, respectively, to Leonie (Leony) (Muckle) Moses and Arthur Cecil Wilson, who were never married. (A at 29, 39, 41, 42) Their father Arthur Wilson is a citizen of Jamaica. (A at 42) Trevor and Earl recognize Mr. Wilson as their father, and he recognizes them as his sons. (A at 27, 39, 41, 42) From the time of their births until 1968, when they were eleven and nine respectively, Trevor and Earl Wilson lived with and were supported by their father. (A at

[11] During the pendency of this case in the court below, the Government agreed to stay the deportation of Mr. Fiallo. Subsequent to the District Court's decision, the Immigration and Naturalization Service sent Mr. Fiallo a notification which ordered him to leave this country. After this notification was sent out, Mr. Fiallo's attorney obtained from the Service a further stay of the deportation. However, Mr. Fiallo left this country for the Dominican Republic, along with his son, upon receiving the notification ordering him to leave, before he knew that the deportation had been stayed again. Since his departure Mr. Fiallo has expressed to his attorneys his continuing desire to live together with his son in this country.

29-30, 39, 41, 42-43) Subsequent to 1968, when they entered the United States with their mother, they have maintained a relationship with their father by visits and letters, and Arthur Wilson has contributed to their support. (A at 30, 39, 41, 42-43)

Upon the death of their mother in 1974 in New York City, Trevor and Earl Wilson requested that their father come to the United States. (A at 30, 39-40, 41, 43) Because of the mother's death, Arthur Wilson obtained a temporary emergency visa and entered the United States. (A at 30, 40, 41, 43) Trevor and Earl wish to stay in the United States, continue their education and eventually become citizens, and they desire and need their father to live with and maintain them in the United States. (A at 30, 40, 42-43) As the older child, Trevor submitted a Form I-550 to the Immigration and Naturalization Service as the proper preliminary procedure for obtaining an immigrant visa and permanent resident status for a parent of a United States permanent resident unmarried child under twenty-one. (A at 31, 40) Trevor Wilson has received no response from the Immigration and Naturalization Service but, as found by the District Court (A at 54), his father will not be exempted from the labor certification requirement since the Immigration and Nationality Act does not recognize an illegitimate child and his father as "child" and "parent."

It is not possible for Mr. Wilson to meet the labor certification requirement since the sole job for which he is qualified – general handy man – is one for which a labor certification will never be furnished. See 29 C.F.R. §60.7 Schedule B. (A at 30-31) Under applicable law, Trevor and Earl Wilson cannot be

legitimated except by marriage of their parents,[12] which is impossible since the mother is dead. (A at 30, 43)

Arthur Wilson left the United States when the extensions he was able to obtain on his temporary visa expired. (A at 30, 40, 41) He returned to Jamaica because without permanent resident status he could not obtain a job in the United States and he felt that in Jamaica he could work and contribute to the support of his children. (A at 30, 40, 41) He also did not want to violate the law by overstaying the time period allowed on his temporary visa. (A at 30, 40, 41) Trevor and Earl Wilson desire that Arthur Wilson return to the United States as a permanent resident so that they can all live together as a family here.[13] (A at 30, 40, 42)

C. Proceedings Below

Plaintiffs instituted this class action on July 22, 1974 in the United States District Court for the Eastern District of New York, challenging the constitutionality of the provisions of the Immigration and Nationality Act which fail to recognize the family relationships of

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[12]"Any child born before the marriage of his or her parents whose parents have intermarried or shall hereafter intermarry shall be deemed on the marriage of such parents to have been legitimated as from the date of such marriage and shall be entitled to all the rights of a child born in wedlock." Laws of Jamaica (Revised Edition 1953) Chapter 217, Section 2 of Legitimation Law; New York Domestic Relations Law §24 (McKinney Supp. 1975).

[13]Subsequent to the submission of this case to the District Court, Trevor Wilson attained the minimal age necessary to apply for citizenship in this country and has made such an application.

United States citizen and permanent resident illegitimate children and fathers of illegitimate children and their alien fathers and children and thereby deny them concomitant statutory rights under the immigration law, solely on account of the gender of the parent and the illegitimate birth status of the child. A divided three-judge court, convened pursuant to 28 U.S.C. §§2282 and 2284, denied plaintiffs' motions for summary judgment and permanent injunction, granted judgment for defendants, and dismissed the action.[14] (A at 53, 74-75)

Plaintiffs' timely Notice of Appeal to this Court was filed on December 31, 1975. (A at 75-76) On June 7, 1976, this Court granted plaintiffs' motion for leave to proceed *in forma pauperis* (A at 78) and noted probable jurisdiction over the appeal. (A at 77)

SUMMARY OF ARGUMENT

By operation of the federal statutory provisions challenged in this case, United States citizen or permanent resident illegitimate children and fathers of

[14]In view of its disposition of the case, the District Court declined to pass on plaintiffs' motion for class action certification. (A at 60) Plaintiffs contend that this action is properly maintainable as a class action pursuant to Rule 23(a), and Rule 23(b)(2) or Rule 23(b)(1)(A) or (B), of the Federal Rules of Civil Procedure. The parties have already stipulated that the numerosity requirement of Rule 23(a) is met. (A at 45) If this Court reverses the judgment appealed from, plaintiffs respectfully request this Court to remand the case back to the District Court for, *inter alia*, determination of plaintiffs' motion for class action certification.

illegitimate children and their alien fathers and children are discriminatorily omitted from the statutory definitions of "child" and "parent" which enable United States citizens and legal permanent residents to remain or be reunited in this country with their alien parents or children. This discrimination is plainly unconstitutional under the First, Fifth, and Ninth Amendments to the United States Constitution because the challenged provisisions infringe fundamental constitutional interests of United States citizens and legal permanent residents, deny basic procedural rights solely on the grounds of the gender of the parent and the illegitimate birth status of the child, and do not further in a rational manner either the actual and exclusive purpose of Congress in enacting the challenged provisions or even the speculative interests advanced by the Government in this case.

The challenged statutory discrimination abridges fundamental constitutional interests of United States citizens and legal permanent residents in family association and mutual companionship in this country between fathers and their illegitimate children. The challenged provisions effectively force the *de facto* deportation from this country of the United States citizen or permanent resident illegitimate child or father of an illegitimate child who seeks to secure a life together with his alien father or child. As illustrated by the plaintiffs' cases, the operative effect of the challenged discrimination is therefore to put these United States citizens and permanent residents to the Hobson's choice of foregoing either their constitutionally protected familial and associational interests, on the one hand, or the equally basic privileges and immunities of their citizenship or residency, on the other.

The challenged provisions completely deny United States citizen or permanent resident illegitimate children and fathers of illegitimate children the opportunity, which is afforded to persons whose parent-child relationships are recognized by the statute, to prove the existence of a family relationship with their alien fathers and children. The challenged classifications grant the opportunity to establish the parent - child relationships consisting of a legitimate child and either parent whether married, divorced, or separated, a legitimated child and either parent, a stepchild and his stepparent, an adopted child and either adoptive parent, an orphaned child and an adoptive or prospective adoptive parent, and an illegitimate child and his mother, but fail to accord a similar opportunity to establish the parent-child relationship of an illegitimate child and his father. Thus, these provisions discriminatorily deny this basic procedural opportunity to the plaintiffs solely on account of the gender of the parent and the illegitimate birth status of the child. Such discrimination, grounded on the immutable characteristics of sex and illegitimacy, rests upon unwarranted stereotypes concerning the fathers of illegitimate children and their relationships with their children and has been condemned repeatedly by this Court.

When subjected to the close judicial scrutiny which is triggered by the abridgement of fundamental constitutional interests of United States citizens and legal permanent residents and by discrimination on grounds of sex and illegitimacy, the challenged provisions plainly cannot pass constitutional muster. However, the provisions are constitutionally deficient in any event, since they fail to rationally advance either the actual Congressional purpose or the conjectural interests in

morality and administrative convenience asserted by the Government.

The exclusive purpose of Congress in enacting the challenged statutes was the unqualifiedly benevolent one of enabling United States citizens and permanent residents to remain or be reunited in this country with their alien parents and children, whether the family relationship be legitimate or illegitimate. That exclusive Congressional purpose is not served, and indeed is frustrated, by the failure of the challenged provisions to recognize the family unit composed of the United States citizen or permanent resident illegitimate child or father and his alien father or illegitimate child, and by their resultant failure to enable that American family to be united in this country. The interests advanced by the Government in defense of these provisions can fare no better. The asserted interest in legislating morality is not only patently unsupportable as an actual concern of Congress but as well would not be rationally served by the particular character of the challenged discrimination. Certainly, fathers of illegitimate children are neither more nor less immoral than mothers of illegitimate children or than fathers of legitimated illegitimate children, and in no event are illegitimate children responsible for the conduct of their parents. Further, neither mothers nor fathers of illegitimate children are legally barred from this country, and indeed some parents of illegitimate children are included within the statutory definition challenged here. Equally, there is no evidence to indicate that Congress had as its objective the Government's asserted interest in facilitating administrative convenience by reducing the potential for spurious claims. Moreover, the purported interest in administrative convenience is

plainly not advanced in a rational manner by the challenged discrimination. The nature and problems of proof of parentage, and the attendant potential risks of spurious claims, are no different for claims of the parent-child relationship of father and illegitimate child than for claims of the parent-child relationships which are recognized by the challenged provisions. In addition, comprehensive administrative procedures and rigorous criminal fraud provisions already are applied to deal with problems of proof and risks of fraud which might inhere in claims of parentage generally. In light of this, the irrebutable presumption created by the challenged provisions that a United States citizen or permanent resident illegitimate child or father of an illegitimate child, and his alien father or child, never have a family relationship is plainly unwarranted and unconstitutional.

Finally, the challenged provisions are not saved from constitutional condemnation here merely because they involve legislation in the immigration field. This case is unique and fundamentally different from those immigration cases where this Court has sustained the exercise of Congressional or executive power. In sharp contrast to those cases, this case involves the constitutionality of an immigration statute designed to benefit United States citizens and legal permanent residents, concerns the infringement of fundamental constitutional interests of United States citizens and permanent residents, deals with essentially procedural due process rights of citizens and residents, challenges unwarranted discrimination on the dual bases of sex and illegitimacy, and involves statutory provisions having the exclusive benevolent purpose to secure the unity of American families and having no concern to promote foreign policy or exclude undesirable aliens perceived to threaten the national security or general welfare of this country.

ARGUMENT

POINT I

TO DENY UNITED STATES CITIZEN AND PERMANENT RESIDENT ILLEGITIMATE CHILDREN AND FATHERS OF ILLEGITIMATE CHILDREN AND THEIR ALIEN FATHERS AND CHILDREN THE STATUTORY STATUS OF PARENT AND CHILD WHICH ALONE WOULD ENABLE THEM TO REMAIN OR BE UNITED TOGETHER IN THIS COUNTRY IMPERMISSIBLY INFRINGES FUNDAMENTAL CONSTITUTIONAL INTERESTS OF UNITED STATES CITIZENS AND PERMANENT RESIDENTS AND DISCRIMINATORILY DENIES THEM THEIR BASIC PROCEDURAL DUE PROCESS OPPORTUNITY TO BE HEARD SOLELY ON THE GROUNDS OF SEX AND ILLEGITIMACY.

A. Fundamental Constitutional Interests Of United States Citizens And Legal Permanent Residents Are Abridged By The Challenged Provisions.

The inevitable effect of the restrictive statutory definition of "child" and "parent" contained in the challenged provisions is to deny United States citizen and permanent resident fathers and children their constitutionally protected interest in a familial relationship and association in this country with their children and fathers.[15] It is well settled by repeated decisions of

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[15] *Contrast Mathews v. Lucas*, ___ U.S. ___, 44 U.S.L.W. 5139, 5142 n. 8 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 771-72 (1975).

this Court that parents and their children have a fundamental constitutional interest in mutual companionship and a life together.[16] "The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and '[r]ights far more precious. . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533 (1953)." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). *Also Levy v. Louisiana,* 391 U.S. 68, 71 (1968); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 169-70 (1972). This fundamental liberty and associational interest in the familial relationship extends equally to fathers as to mothers and equally to illegitimate as to legitimate relationships.

> It is no less important for a child to be cared for by its. . .parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised. . .' *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). *Weinberger v. Wiesenfeld,* 420 U.S. 636, 652 (1975).

See also Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 169 (1972); *Stanley v. Illinois,* 405 U.S. 645, 652 (1972); *Levy v. Louisiana,* 391 U.S. 68, 71-2 (1968). The State cannot replace the parent in his function of nurturing and rearing his own child.

> It is cardinal. . .that the custody, care, and nurture of the child reside first in the parents, whose

[16]These constitutionally fundamental interests have variously been found by this Court to be protected by the First, Fifth, or Ninth Amendments. *Roe v. Wade,* 410 U.S. 113 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

> primary function and freedom include the preparation for obligations the state can neither supply nor hinder. *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

These fundamental constitutional interests in family association are necessarily denied by operation of the challenged provision, unless the United States citizen or legal permanent resident is willing to acquiese in his *de facto* deportation from this country, with the attendant loss of important rights, in order to be united abroad with his father or child. Because a minor child is often unable to sustain himself without the care and companionship and the financial support of his father, especially where he is the sole caring parent, the statutory barrier to the unification of the parent and child in this country will often force the United States citizen or permanent resident child or citizen father to depart from this country. Thus, if the alien parent is not permitted to live in the United States, the citizen child may be effectively forced to leave his country to remain with the parent. Also, a United States citizen father may feel compelled to leave this country along with his child rather than send him off alone to another country where there is no one to care for him.

The effect on the United States citizen child or father of this *de facto* deportation is to abridge his fundamental interest in living in this country, a prime incident of his citizenship. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 642 (1969) (concurring opinion); *United States v. Wheeler,* 254 U.S. 281, 293 (1920). The effect on the legal permanent resident child is to jeopardize his resident status and eligibility for future citizenship. *Cf. Hampton v. Mow Sun Wong,* ___ U.S. ___, 48 L.Ed. 2d 495 (1976). In order to maintain a legal

permanent resident status, an alien must have residency in this country, and to be eligible for citizenship a legal permanent resident must maintain that status for five years. Absences from this country, other than very temporary ones, indicate an abandonment of legal permanent resident status, *Matter of Kane,* BIA Interim Decision #2371 (April 1, 1975), and also can render the resident ineligible for citizenship. INA § 316(a) and (b) (8 U.S.C. § 1427(a) and (b)).

Accordingly, the operation of the challenged provisions forces the plaintiff United States citizens and permanent residents to choose between their constitutionally protected familial and associational interests, on the one hand, and the equally basic privileges and immunities of their citizenship or residency, on the other. Thus, Mr. Warner, the United States citizen father of Serge Warner, is put to an impossible choice. If he decides to remain in the country of his citizenship, he will have no alternative but to send the child he has always supported and exclusively cared for since 1969 to a country where there is no one to care for him. If, on the other hand, Mr. Warner decides to continue to live with his son, he has no choice but to leave the United States. Ramon Martin Fiallo, a five-year-old United States citizen, has already been forced to leave the country with his alien father, Mr. Fiallo, who is and has always been his primary caretaker and companion. Trevor and Earl Wilson, legal permanent residents of the United States, already have been denied a parent-child relationship with their only surviving parent, since their father had to leave this country due to the lack of statutory recognition of their family relationship.

B. The Challenged Provisions Discriminatorily Deny To United States Citizens And Permanent Residents Their Fundamental Procedural Due Process Opportunity To Establish Their Family Relationships With Their Alien Parents And Children, Solely On The Bases Of The Immutable Characteristics Of Sex And Illegitimacy

This Court has held that "[a]t its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie v. Connecticut,* 401 U.S. 371, 374 (1971). " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean,* 234 U.S. 385, 394 (1914)." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970). *Also Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950); *cf. Hampton v. Mow Sung Wong,* ___ U.S. ___, 48 L.Ed. 2d 495, 520 n.1 (1976) (dissenting opinion). By operation of the challenged provisions United States citizens and permanent residents and their alien fathers and children are completely denied any opportunity to establish the existence of their family relationship. *Contrast Mathews v. Lucas,* ___ U.S. ___, 44 U.S.L.W. 5139, 5142 n.8 (1976). Thus, the challenged provisions effectively create an unwarranted conclusive presumption that United States citizens or permanent residents and aliens who claim the relationship of illegitimate child and unwed father never have that relationship, even if they in fact do. *See Turner v. Department of Employment Security,* 423 U.S. 44 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *United States Department of Agriculture v. Moreno,* 413 U.S.

528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The basic procedural due process opportunity to be heard, and thus the fundamental constitutional interests at stake for United States citizens and permanent residents, are abridged by the challenged provisions solely on account of the gender of the parent and the illegitimate birth status of the child. A child can be a "child" under the challenged provisions if he is a legitimate child, a legitimated child, a stepchild, an adopted child, an adopted or prospective adopted orphan child, or an illegitimate child in relation to his mother, but not if he is an illegitimate child in relation to his father. A father or mother can be a "parent" under the challenged provisions if he or she is a married, divorced, or separated parent of a legitimate child, a parent who fortuitiously lives in a country where he can accomplish legitimation of his child, a stepparent, an adoptive or prospective adoptive parent, or the mother of her illegitimate child, but not if the parent is the father of his illegitimate child.

The gender-based and illegitimacy discrimination which occurs here[17] in combination rests upon archaic and overbroad stereotypes concerning the character of unwed fathers and their relationship to their illegitimate

[17]The primary sex discrimination imposed by the challenged provisions is against illegitimate children and their fathers. However, the provisions discriminate against women as well. Under the challenged provisions the United States citizen or permanent resident father has the assurance that if he is unable to care for his illegitimate United States citizen or permanent resident child, that child can be united in this country with the other parent, the mother. However, because of the operation of the challenged classifications, the United States citizen or

(continued)

children. Cf. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972). Men, and especially out-of-wedlock fathers, traditionally have been stereotyped as having no interest in child rearing. Women, on the other hand, are stereotyped as the center of the home and family and as concerned exclusively with child raising. These stereotypes tend to foster each other and, as this Court has observed, suggest fixed roles which ignore individual circumstances. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). Specifically, this Court has recognized that fathers, including out-of-wedlock fathers, may be the sole and primary caretakers of or otherwise have close relationships with their children. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 169 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The invalidity of stereotypes which depict the father of an illegitimate child as having little interest in and only a superficial relationship with his child and with the child's mother is confirmed by current social science literature and by the facts of the plaintiffs' cases.

Sociological literature and empirical studies demonstrate that in fact most out-of-wedlock pregnancies

(footnote continued from preceding page)

permanent resident mother has no similar assurance in the event that she is unable to take care of her illegitimate child, since the father is effectively barred from entering this country because he is not included within the statutory definition of "parent." Thus, Leony Moses, the legal permanent resident mother of Trevor and Earl Wilson, could not be assured that upon her death her children would be supported and cared for in this country by the remaining parent, the father, Arthur Wilson. *Cf. Weinberger v. Wiesenfeld*, 420 U.S.636, 645 (1975).

result from exclusive long-term relationships between the mothers and fathers,[18] which are similar to the relationships of married or courting couples in the general population.[19] The father of the child often

[18]C. Bowerman, D. Irish, H. Pope, *Unwed Motherhood: Personal And Social Consequences* 97. Partial Report of Projects #006 and #189, Social Security Administration, Division of Research and Statistics, Institute for Research in Social Science, University of North Carolina, Chapel Hill, (1966), Unpublished (cited hereinafter as *Bowerman, Irish & Pope*), partially reported in Pope, "Unwed Mothers and Their Sex Partners," 29 *Journal of Marriage and The Family* 555, 558 (August, 1967), (cited hereinafter as *Pope*); Chaskel, "Unmarried Mother: Is She Different?" 46 *Child Welfare* 65, 72 (1967), (cited hereinafter as *Chaskel*); Herzog, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April, 1966) (cited hereinafter as *Herzog*); Knight, "Conference for Pregnant Unwed Teenagers," 65 *Journal of Nursing* 126 (July, 1965), (cited hereinafter as *Knight*); *New York Times*, July 29, 1969, at 58, col. 1; M. Sauber and E. Rubinstein, *Experiences Of The Unwed Mother As A Parent* 27, Community Council of Greater New York (1965), (cited hereinafter as *Sauber and Rubinstein*), partially reported in Sauber, "The Role Of The Unmarried Father," 4 *Welfare in Review* 15, 16 (Nov. 1966), (cited hereinafter as *Sauber*).

[19]Unwed mothers and fathers generally have a similar education and socioeconomic status. *Bowerman, Irish, and Pope, supra* note 18, at 117, 120; *Herzog, supra* note 18, at 194; R. Pannor, F. Massarik, B. Evans, *The Unmarried Father* 35 (1971), (cited hereinafter as *Pannor Massarik, and Evans*); *Pope, supra* note 18, at 560; Vincent, "Unmarried Fathers," in *Marriage and the Family in the Modern World* 294, 297 (R. Cavan ed., 1969), (cited hereinafter as *Vincent*); Wessel, "A Physician Looks At Services For Unmarried Parents," 49 *Social Casework* 11, 12 (1968), (cited hereinafter as *Wessel*). Age differentials between unwed mothers and fathers approximate husband and wife age differentials in the general population. *Bowerman, Irish and Pope, supra* note 18, at 108, 120; P. Ewer, Final Report, HSMHA, Maternal and Child Health Service, Project H-214-2,

(continued)

wishes to marry but the mother refuses.[20] Many fathers live with their illegitimate children.[21] Even fathers not

(footnote continued from preceding page)

Characteristics of AAPP Unwed Fathers – A Descriptive Study 13 (1971), (cited hereinafter as *Ewer*), (unpublished, obtained from Division of Research, Maternal and Child Health Service, HSMHA, 5600 Fishers Lane, Room 12A-11, Rockville, Md. 20852); *Pannor, Massarick, and Evans, supra* at 35; *Pope, supra* note 18, at 560; *Vincent, supra* at 297. The unwed fathers generally live in the same locality as the mothers and have mutual associates with the mothers *(Bowerman, Irish and Pope, supra* note 18, at 94; *Ewer, supra* at 13; *Pope, supra* note 18, at 557), and are well acquainted with the mothers' families. *Bowerman, Irish and Pope, supra* note 18, at 94; *Pope, supra* note 18, at 557. Most unwed couples meet through friends or relatives or at school or work. *Sauber and Rubinstein, supra* note 18, at 26; *Sauber, supra* note 18, at 16. Unwed parents constitute a cross section of the population and represent all socioeconomic classes. *Chaskel, supra* note 18, at 65.

Finally, premarital sex in this society is not confined to unwed parents, but rather is prevalent in the general population. See Hunt, *Sexual Behavior In The 1970's* (1974) (reporting that 97% of males and 2/3's of females had premarital sex by age 25); Kinsey, Pomeroy, Martin and Gebhard, *Sexual Behavior In The Human Female* 286 (1953); Kinsey, Pomeroy, and Martin, *Sexual Behavior In The Human Male* 249 (1948); Vener and Stewart, "Adolescent Sexual Behavior In Middle America Revisted: 1970-1973," 36 *Journal of Marriage and the Family* 728 (1974).

[20]*Bowerman, Irish and Pope, supra* note 18, at 131, 140; *Herzog, supra* note 18, at 194; *Knight, supra* note 18, at 126.

[21]*Sauber and Rubinstein, supra* note 18, at 53; *Sauber, supra* note 18, at 16. 1970 Census figures disclose that 99,364 children under eighteen were living in families or subfamilies headed by their single male parent. U.S. Bureau of the Census, 1 *U.S. Census of the Population 1970, Characteristics of the Population*, Pt. 1, U.S. Summary - Sec. 2, Table 206 (1973). A single male parent is defined as one who has never been married and is not

(continued)

living with their illegitimate children demonstrate genuine interest in and concern for them,[22] and assume the sociological functions of fatherhood, including the provision of financial and emotional support.[23] Children form equally strong bonds with their fathers as with their mothers,[24] and paternal deprivation has a profound psychological effect on the child's self-concept, academic achievement, intellectual development, and moral development.[25]

(footnote continued from preceding page)
widowed, divorced, or separated. U.S. Bur. of the Census, 1 *U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summary* Sec. 2, Appendix B at 22 (1973). A child under eighteen is designated as "own child under eighteen" and is defined as a son or daughter by blood or adoption who has never married. Thus, wards, foster or other blood relations, e.g., nieces, are not included. *Id.*, Appendix B at 25. Single parent adoptions are rare and therefore do not significantly affect census figures. See Kaduskin, "Single Parent Adoption: An Overview," 44 *Social Services Review* 263 (1970), (reporting two adoptions by single fathers in that year).

[22]Chaskel, "Changing Patterns In Services For Unmarried Parents," 49 *Social Casework* 3, 10 (1968); *Knight, supra* note 18, at 126.

[23]*Ewer, supra* note 19, at 2 and Table 33 (finding that between 59% and 83% of fathers of illegitimate children contributed money for their children's expenses and between 69% and 74% of fathers not living with their illegitimate children visited them).

[24]Kotelchuck, Zelazo, Kagan, and Spelke, "Infant Reaction To Parental Separations When Left With Familiar And Unfamiliar Adults," 126 *The Journal of Genetic Psychology* 255 (June, 1975); Ross, Kagan, and Zelazo, "Separation Protest In Infants In Home And Laboratory," 11 *Developmental Psychology* 256 (1975); Spelke, Zelazo, Kagan and Kotelchuck, "Father Interaction And Separation Protest," 9 *Developmental Psychology* 83 (1973).

[25]H. Biller, *Paternal Deprivation* (1974); D. Lynn, *The Father: His Role In Child Development* (1974).

The stereotypes concerning illegitimate fathers and their relationships with their children have absolutely no validity in their application to the facts of this case. All the plaintiff fathers publicly acknowledged the paternity of their children soon after their births, and their parentage was recognized by their children and by the mothers of the children. Each of the plaintiff fathers has lived with his child for a substantial period of the child's life and when unable to live with the child has supported and frequently visited him. Each of the plaintiff children has established a close and dependent relationship with his father.

Consistent with the increasing recognition that the indiscriminate stereotyping of persons because of their sex or illegitimate birth status is wholly unfounded and unwarranted, this Court has repeatedly condemned discrimination grounded on the mere status of gender[26] or illegitimacy.[27]

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[26]*Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971).

[27]*Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Beaty v. Weinberger,* 478 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Gomez v. Perez,* 409 U.S. 535 (1973); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972); *Davis v. Richardson,* 342 F. Supp. 588 (D. Conn., 1972), *aff'd.* 409 U.S. 1069 (1972); *Griffin v. Richardson,* 346 F. Supp. 1126 (D. Md., 1972), *aff'd.* 409 U.S. 1069 (1972); *Glona v. American Guaranty and Liability Insurance Co.,* 391 U.S. 73 (1968); *Levy v. Louisiana,* 391 U.S. 68 (1968).

C. Since The Challenged Provisions Abridge Constitutionally Fundamental Interests Of United States Citizens And Legal Permanent Residents And Discriminate Solely On Grounds Of Sex And Illegitimacy, This Court Should Subject The Classifications To Close Judicial Scrutiny.

This Court has long made it clear that statutes which burden constitutionally fundamental liberty and associational interests must be subjected to exacting judicial scrutiny. *See Massachusetts Board of Retirement v. Murgia,* ___ U.S. ___, 44 U.S.L.W 5077, 5079 (1976); *Roe v. Wade,* 410 U.S. 113, 152-56 and cases cited therein (1973). Equally, this Court has imposed a heavy burden of constitutional justification on statutes which discriminate solely and finally on the bases of the immutable characteristics of gender and illegitimacy that rest on archaic and overbroad stereotypes. See cases at notes 26 and 27 of this brief, *supra.*

The provisions challenged here operate through an unwarranted conclusive presumption to deny United States citizen and permanent resident illegitimate children and fathers of illegitimate children any opportunity to establish their family relationships with their alien fathers or children, and thereby deny them their constitutionally fundamental interests in familial association and companionship, solely because of the gender of the parent and the illegitimate status of the child. When the challenged provisions are subjected to the close judicial scrutiny which is thus required, it is clear that the procedural ban imposed on the plaintiff United States citizens and permanent residents and their plaintiff alien fathers and children sweeps far too broadly to pass constitutional muster under equal

protection and due process principles of the Fifth Amendment's Due Process Clause. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Stanley v. Illinois,* 405 U.S. 645 (1972). Moreover, as demonstrated in POINTS II and III, *infra,* the challenged provisions are patently unconstitutional whatever be the applicable standard of constitutional review, since they fail to further in a rational manner either the actual Congressional purpose of the provisions or the conjectural interests asserted by the Government.

POINT II

THE CHALLENGED PROVISIONS DO NOT RATIONALLY FURTHER THE ACTUAL AND EXCLUSIVE PURPOSE OF CONGRESS TO ENABLE UNITED STATES CITIZENS AND LEGAL PERMANENT RESIDENTS TO REMAIN OR BE REUNITED IN THE UNITED STATES WITH THEIR ALIEN PARENTS OR CHILDREN, WHETHER THE FAMILY RELATIONSHIP BE LEGITIMATE OR ILLEGITIMATE.

This court has repeatedly held that the constitutionality of federal statutes must be determined in light of the actual purpose of Congress as disclosed by an examination of the legislative history and the statutory scheme. *Mathews v. Lucas,* ___ U.S. ___, 44 U.S.L.W. 5139, 5143 n.14 (1976); *Stanton v. Stanton,* 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Jimenez v. Weinberger,* 417 U.S. 628 (1974). An examination of the relevant legislative history leaves no doubt that the actual and exclusive purpose of Congress in enacting the challenged statutory provisions

was the benevolent and ameliorative objective of enabling United States citizens or legal permanent residents to remain or be reunited in this country with their alien parents or children, whether their relationship be legitimate or illegitimate. *Cf. Immigration Service v. Errico,* 385 U.S. 214, 219-220 and n. 9 (1966). Upon analysis, it is clear that the challenged provisions are patently violative of equal protection principles of the Fifth Amendment's Due Process Clause because they bear no rational relationship to this exclusive Congressional purpose.

The Immigration and Nationality Act of 1952, Act of June 27, 1952, P.L. 82-414, 66 Stat. 163, revised and codified all immigration laws into one comprehensive statute. House Report No. 1365, 82nd Cong., 2d Sess. (1952). The 1952 Act defined "parent" and "child" and thus the status which enables United States citizens or legal permanent residents to remain or be reunited in this country with their alien children or parents. 66 Stat. 171. The House Report explained that the statute "implements the underlying intention of our immigration laws regarding the preservation of the family unit." House Report No. 1365, 82d Cong., 2d Sess., p. 29 (1952).

The 1957 modification of the definition of "child" and "parent" to include stepchildren born out-of-wedlock and their parents, and illegitimate children in relation to their mothers and those mothers (71 Stat. 639) was explained in the legislative history as furthering the "clearly expressed legislative intention to keep together the family unit whenever possible." House Report No. 1199, 85th Cong. 1st Sess., p. 8 (1957). Further, the House Report stated:

> The legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united. House Report No. 1199, 85th Cong. 1st Sess., p. 7 (1957).

The legislative purpose to maintain or to reunite the family unit was repeatedly stressed in the Congressional debate on the 1957 Act in both Houses:

> This bill is praiseworthy in its fundamental purpose – to reunite families. Senator Pastore, Co-sponsor, 103 Cong. Rec. 15497 (1957)

> My heart is glad for the thousands of American citizens who will now be able to be reunited with their families from whom they have been separated because of the working of our immigration law. Senator J.F. Kennedy, Co-sponsor, 103 Cong. Rec. 16719 (1957)

> We find, then, that the fundamental principle behind the most important provisions of this bill is the reunification of families, a principle to which all must subscribe. In this bill we move forward to remove the personal tragedy of split and separated families. This is a family bill – a bill for the family – the American family.
> Congressman Rodino, House Judiciary Committee, 103 Cong. Rec. 16307 (1957).

> RODINO: Is it not a fact that the fundamental principle behind the provisions and the most important provision of this bill is the reunification of families?
>
> CELLER: This is correct.
> Colloquy between Congressman Celler, Chairman of the Judiciary Committee and Congressman Rodino, member of the Committee, 103 Cong. Rec. 16301 (1957).

The 1957 legislative history clearly demonstrates that Congress was concerned with preserving "illegitimate" as well as "legitimate" family relationships:

> [I]t is believed that there is a need for the enactment of the instant section, in order to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock. . .
> House Report No. 1199, 85th Cong. 1st Sess., p. 7 (1957).

> Sympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent. . .
> House Report No. 1199, 85th Cong. 1st Sess., p. 8 (1957).

Thus the legislative history of the provisions defining "child" and "parent" clearly discloses that the sole Congressional purpose was to enable United States citizens and permanent residents to remain or be reunited with their alien parents or children in the United States, without regard to the legitimacy of the family relationship.

The challenged provisions recognize the parent-child relationships of a legitimate child and either parent whether married, divorced or separated, a legitimated child and either parent, a stepchild and his stepparent, an adopted child and either adoptive parent, an orphaned child and an adoptive or prospective adoptive parent, and an illegitimate child and his mother, but fail to recognize the parent-child relationship of an illegitimate child and his father. Failing to accord the status of "parent" and "child" to family units composed of illegitimate children and their fathers while granting that status to other family units also

composed of parents and children, solely on the basis of the gender of the parent and the illegitimate birth status of the child, does not rationally foster the purpose of Congress to maintain or reunite in this country family units containing United States citizen or permanent resident members. Indeed, the restrictive definition of "parent" and "child" actually perpetuates the very hardships attendant upon parent-child separation which the statutes were intended to alleviate, since denial of the status effectively precludes the United States citizens or permanent residents and their fathers or children from a life together in this country. The resultant hardships are dramatically illustrated by the circumstances of the plaintiffs herein, whose strong family ties are threatened with permanent disruption because of the discriminatory definition of "parent" and "child" in the challenged provisions. Thus, because the statutory definition arbitrarily fails to recognize their parent-child relationship, five-year-old United States citizen Ramon Martin Fiallo is unable to be united in this country with his alien father, his primary caretaker and constant companion since his birth. United States citizen Cleophus Warner is prevented from living together in this country with his alien son for whom he is the sole caring parent. Legal permanent residents Trevor and Earl Wilson are rendered unable to maintain a relationship in this country with their alien father, their sole surviving parent.

The utter irrationality of the challenged classifications is illustrated by the stepparent provision. INA §101(b)(1)(B) and (2) (8 U.S.C. §1101(b)(1)(B) and (2)) A father is never considered the "parent" of his illegitimate child. But if the parent marries, under the stepparent provision, his wife may be his illegitimate

child's "parent" and if his wife has an illegitimate child, he may be her child's "parent". It is wholly arbitrary for the challenged provisions to give recognition to the stepparent-stepchild relationship but not to the parent-child relationship between a father and his illegitimate child.[28] It is equally irrational, in light of the exclusive Congressional purpose to unite family units, to flatly deny recognition to all father-illegitimate child relationships while extending recognition automatically to all relationships between a legitimate child and his divorced or separated parent, an orphaned child and his adoptive or prospective adoptive parent, a legitimated child and his parent, and an illegitimate child and his mother.

Accordingly, the conclusion is inescapable that the challenged provisions violate equal protection principles of the Fifth Amendment's Due Process Clause, since the classifications created by the definition of "parent" and "child" discriminate against the plaintiffs solely on the bases of the gender of the parent and the illegitimate

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[28]The recognition of a stepparent, but not a natural father, as a parent contravenes the general conceptions of the obligations and rights of parenthood expressed by state laws. Thus, in every state in this country, fathers must support their illegitimate children. See, for example, Cal. Civ. Code §196a; Ga. Code Ann. §74-202 (1973); Kan. Stat. Ann. §§38-1101 to 38-1109 (1973); Mass. Gen. Laws Ann. ch. 273, §§11-19 (1970); Mich. Comp. Laws §722.712 (1968); New York Domestic Relations Law §33 (McKinney 1964); N.D. Rev. Code ch. 14-17 (1971); S.C. Code §20-303 (1962); Va. Code Ann. §20-61.1 (1973); Wyo. Stat. Ann. §§14-59-96 (1965). On the other hand, thirty-seven states impose no support obligation on a stepparent. Three states impose a support obligation on the stepparent only when the stepchild is destitute. Haw. Rev. Stat. §577-4; N.H. Rev. Stat. Ann. ch. 546A-2; Ore. Rev. Stat. §109.055.

birth status of the child and bear no rational relationship to the exclusive purpose of Congress to make possible the unification in this country of family units, whether legitimate or illegitimate, which contain United States citizen or permanent resident members. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

POINT III

THE INTERESTS ASSERTED BY THE GOVERNMENT IN THIS CASE WERE NOT ACTUAL PURPOSES OF CONGRESS AND IN ANY EVENT ARE NOT RATIONALLY FURTHERED BY THE CHALLENGED CLASSIFICATIONS.

As justification for the invidious discrimination and the infringement of constitutionally protected interests worked by the challenged provisions, the Government has advanced and the majority below relied upon interests which clearly find no support in the legislative history as actual concerns of Congress. Although these interests are therefore not legitimate governmental interests in light of which the constitutionality of the challenged provisions can be judged,[29] they could not in any event support the rationality of the challenged classifications.

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[29]See this brief at p. 31, *supra*.

A. The Asserted Governmental Interest In Legislating Morality Was Not a Purpose Of Congress And In Any Event Is Not Rationally Advanced By The Challenged Classifications.

The legislative history is barren of any indication that the challenged provisions were inspired by a Congressional moral aversion to any group of unwed parents and their illegitimate offspring. Rather, as demonstrated above and as found by the Court below,[30] Congress was motivated by a benevolent and generous desire to confer a benefit on United States citizens and permanent residents who seek to be united in this country with their parents or children, whether the relationship be legitimate or illegitimate. See this brief at p. 31 *et seq., supra.* A legislative purpose to ban "immoral" illegitimate children and their fathers from this country is belied by the statutory scheme itself. Not only are illegitimate children and their parents not generally barred from this country under the immigration law (see INA §212 (8 U.S.C. §1182)), but, further, most of them are already included in the very statutory definition which is challenged here.[31] Illegitimate children and their mothers, for example, are

[30] A at 59 (majority), 67 (dissent).

[31] Although it is theoretically possible under the law for alien illegitimate children and fathers of illegitimate children to be admitted to this country, as a practical matter their non-inclusion in the statutory parent-child definition precludes them from entering this country, because of the extreme difficulty of satisfying the restrictive numerical quota and labor certification requirements from which a "parent" and "child" are exempted. See this brief at pp. 4-6, *supra.*

included within the definition of "parent" and "child" and their unification in this country is thus realistically made possible. Not even all illegitimate children and their fathers are denied the statutory right, since it is granted, for example, to illegitimate children and their fathers who come from countries or live in states which allow subsequent legitimation by means other than marriage to the mother of the child. See this brief at pp. 46-47, *infra.*

Further evidence that Congress could not have been concerned with "morality" here is that children of adulterous relationships meet the definition of child under the statute. For example, the child of a married man and his concubine is recognized as his legitimate child under the challenged provisions. *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969). Also, a child is considered the stepchild of a woman under the challenged provisions notwithstanding that he is born as a result of an illicit relationship between her husband and another woman during the marriage. *Matter of Stultz*, BIA Interim Decision #2401 (1975).

Moreover, the challenged classifications would not rationally further any such moral considerations. A father of an illegitimate child is neither more nor less immoral than the mother of an illegitimate child, or than the father of an illegitimate child who fortuitously lived in a foreign country or a state in this country where legitimation is allowed by means other than marriage,[32] or than a man whose adultery results in the birth of a child. Finally, it is wholly impermissible and irrational to punish the innocent United States citizen

[32] See this brief, at pp. 46-47, *infra.*

and permanent resident children for assertedly "immoral" conduct of their fathers over which they had no control. *Levy v. Louisiana*, 391 U.S. 68 (1968); *cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

B. The Interest Asserted By The Government In Avoiding Administrative Inconvenience Attendant Upon Identifying Spurious Claims Of Paternity Was Not A Purpose Of Congress And In Any Event Is Not Rationally Advanced By The Challenged Discrimination.

1. Introduction

The legislative history is devoid of any indication that in denying a father any opportunity to prove the parentage of his illegitimate child Congress was concerned with administrative inconvenience involved in identifying spurious claims of paternity. Indeed, Congress has specifically chosen to deal with any problems of fraud through other statutory provisions, which punish and deter fraudulent conduct through the creation and imposition of criminal penalties and the sanction of excludability.[33] *Cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973). Further, comprehensive and elaborate adminis-

[33]INA §275 (8 U.S.C. §1325) makes it a crime to obtain "entry into the United States by a wilfully false or misleading representation or the wilful concealment of a material fact. . . ." 18 U.S.C. §1546 makes it a crime to impersonate another when applying for a visa or other document required for entry into the United States, evade or attempt to evade the immigration laws *(continued)*

trative procedures and practices established pursuant to Congressional authorization are regularly employed by the Immigration Service and United States Consuls in passing on claims of the existence of a parent-child relationship and in dealing with any attendant problems of proof. Finally, the parentage issue and the specific proof submitted in support of a parentage claim are often identical for persons who claim the father-illegitimate child family relationship and for persons who claim family relationships included within the challenged statutory definition. In light of these considerations, it is clear that the interest asserted by the Government in serving administrative convenience by reducing the purported potential for spurious paternity claims was not an actual purpose of Congress and that, in any event, the challenged classifications do not further such an interest in a rational manner.

(footnote continued from preceding page)
by appearing under an assumed or fictitious name, "knowingly" make "under oath a false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations" or "knowingly" present "any such application, affidavit or other document containing any such false statement." See also the criminal provisions of 18 U.S.C. §1001, regarding the making of a false or fraudulent statement in any matter within the jurisdiction of a United States department or agency, and of 18 U.S.C. §371, dealing with a conspiracy to defraud the United States or any of its agencies. Finally, in addition to being subjected to criminal penalties, any alien who seeks to procure, has sought to procure or has procured a visa or other documentation or seeks to enter the United States by fraud or by wilfully misrepresenting a material fact, is totally excludable from the United States. INA §212(a)(19) (8 U.S.C. §1182(a)(19)).

2. Administrative Procedures and Practices

The application of any United States citizen or legal permanent resident for entry of his alien parent or child as an immigrant into the United States is processed through a series of rigorous procedures established pursuant to Congressional authorization and administered by officials of the Immigration and Naturalization Service and by United States Consuls.[34] A full understanding of these procedures is crucial to recognizing that *all* claims of parentage, including those that would be made by the plaintiffs herein, are subjected to careful and exacting administrative scrutiny.

Satisfactory proof of the parent-child relationship generally must be made separately to two different immigration officials and a consular official.[35] All applications are made under oath,[36] and the burden of establishing the parent-child relationship rests on the citizen or resident and his alien relative.[37] Immigration and consular officials have great latitude in determining the character and quantum of proof required in order for the citizen and alien relative to satisfy their burden of proof in each individual case. Thus, these officials may require birth certificates, marriage certificates, baptismal certificates, school records, census records,

[34]INA §§103, 104 (8 U.S.C. §§1103, 1104).

[35]INA §§204, 221(a), 235(a) (8 U.S.C. §§1154, 1201(a), 1225(a)); 8 C.F.R. §§204.1(a), 235.1(a); 22 C.F.R. §42.21.

[36]INA §§204(a), 222(e) (8 U.S.C. §§1154(a), 1202(e)); 22 C.F.R. §42.117(b).

[37]INA §§224, 291 (8 U.S.C. §§1204, 1361); 22 C.F.R. §42.21.

affidavits, letters, photographs, remittances, proof of custody, proof of support, blood tests at the expense of the citizen or resident and his alien relative, and any other evidence they deem necessary.[38] Failure to comply with a request for evidence by an official – for example, the refusal to produce the results of a blood test – can result in denial of the application.[39] In determining a claim of parentage, the immigration official may conduct any necessary investigation, take testimony, and obtain the issuance of subpoenas for the attendance of witnesses or the production of documents.[40] In addition to any investigation done by an immigration official, a consular official also conducts an extensive and comprehensive background investigation of the alien relative.[41] The consular official cannot approve any application without a personal appearance and interrogation under oath,[42] and he has authority to require that the alien answer any question which is deemed material in his discretion.[43] The consular

[38]INA §§204(a), 222(b) (8 U.S.C. §§1154(a), 1202(b)); 8 C.F.R. §204.2; 22 C.F.R. §42.111; Instructions to INA Form I-130, given the force of regulation by 8 C.F.R. §103.2(a).

[39]8 C.F.R. §204.2(c)(8).

[40]INA §235(a) (8 U.S.C. §1225(a)); 8 C.F.R. §§103.2(b), 287.4.

[41]INA §§221(b), 222(a) (8 U.S.C. §§1201(b), 1202(a)); 22 C.F.R. §42.111; Part IV, Appendix E, 9 Foreign Affairs Manual – Visas (Publication of U.S. Department of State available in Immigration and Naturalization Service Public Reading Rooms).

[42]INA §222(e) (8 U.S.C. §1202(e)); 22 C.F.R. §42.114, 42.117.

[43]22 C.F.R. §42.117(c).

official as well has broad discretion in passing on the claim and may refuse to issue a visa if he has "reason to believe" that an alien is ineligible for a visa.[44]

In addition to proving his family relationship to the citizen or permanent resident, any claimed alien relative of a United States citizen or resident, like any other alien seeking entry, must also prove his general eligibility to enter the United States.[45] The sustaining of that burden of proof involves the submission of extensive biographical data bearing on family background, of employment and residence history, and of police and military service records, and requires submission to a medical examination.[46] For example, one of the requirements for entry of an alien into the United States is satisfactory proof that he is not "likely to become a public charge."[47] The citizen parent therefore must prove by affidavit, bank statement, employment record, tax record, and other appropriate evidence that he can support himself and his alien child in this country. An alien parent must similarly prove that he is able to support himself and his citizen or permanent resident child and that he has sufficient resources to sustain himself and his child while he seeks employment.[48] Finally, consular and immigration officials have the authority to subsequently revoke any approval of entry which they have given.[49]

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[44]INA §221(g) (8 U.S.C. §1201(g)).

[45]INA §§212(a), 291 (8 U.S.C. §§1182(a), 1361); 22 C.F.R. §42.91(a)

[46]INA §§221(b) and (d), 222 (8 U.S.C. §§1201(b) and (d), 1202).

[47]INA §212(a)(15) (8 U.S.C. §1182(a)(15)).

[48]22 C.F.R. §42.91 (40 Fed. Reg., No. 179, September 15, 1975, pp. 42532-33); Part III, 9 Foreign Affairs Manual – Visas, 22 C.F.R. §42.91(a)(15) – Notes; Department of State Form DSL-845.

[49]INA §§205, 221(i) (8 U.S.C. §§1155, 1201(i)).

3. Proof of Family Relationships

The elaborate and exacting administrative procedures detailed above are applied to all claims of family relationships included within the statutory definition of parent and child. The problems of proof and the potential for spurious claims are no different for the claims of family relationships recognized by the provisions than they would be for the claims of the family relationship of father and illegitimate child, because the proof adduced in support of the different claims is often identical. Thus, the United States citizen stepmother who petitions for entry into this country of the illegitimate child of her husband as a stepchild under the challenged provisions must necessarily prove paternity of the child by her husband. That issue of paternity, and the proof adduced in support of the paternity claim, are identical to the paternity issue and the supporting proof that would be involved in the husband's petition for entry into this country of the child as his illegitimate child. Specifically, if United States citizen Cleophus Warner were married to a United States citizen who petitioned for the entry into this country of his illegitimate son Serge Warner as her stepchild, she would have to establish to the satisfaction of immigration and consular authorities that Serge is in fact Mr. Warner's child, and on the exact same evidence that Mr. Warner would submit to establish his relationship as father of his illegitimate son.

It is equally true that the proof submitted to establish the existence of the statutorily recognized family relationship of parent and legitimate or legitimated child is often the same as the proof that would be offered to establish the family relationship of father

and illegitimate child. Although proof of legitimacy or legitimation brings with it statutory recognition of the parent-child relationship, the laws of various countries and even of states of this country are extremely diverse with respect to criteria for establishing legitimacy or legitimation. In some countries and in some states in this country no distinction is made between legitimate and illegitimate children – all children are simply legitimate.[50] In some countries children of adulterous relationships are legitimate.[51] Legitimation requirements are also diverse. Legitimation can occur through public acknowledgment and treatment of the child as his own by the father,[52] maintenance of the child by the father,[53] payment of medical bills associated with the child's birth,[54] a written declaration of paternity by the

[50]E.g., *Matter of G---*, 9 I&N Dec. 518 (BIA 1961) (law of Hungary); *Matter of Sinclair*, 13 I&N Dec. 613 (BIA 1970) (law of Panama); Ariz. Rev. Stat. Ann. §8-601; Ore. Rev. Stat. §109.060 (1975).

[51]E.g., *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969) (law of China, Hong Kong law).

[52]E.g., Cal. Civ. Code §7004(4) (Supp. 1975) (Uniform Parentage Act); Idaho Code §16-1510 (1948); Mont. Rev. Codes §61-301 to §61-327 (Supp. 1975) (Uniform Parentage Act); Oka. Stat. Ann. tit. 10, §55 (1966); S.D. Compiled Laws tit. 25, §6-1 (1967); Utah Code Ann. tit. 78, §30-12 (1953); Wash. Rev. Code Ann. §11.04.081 (1967).

[53]E.g., *Matter of Kwan*, 13 I&N Dec. 302 (BIA 1969) (law of China, Civil Code).

[54]E.g., Colo. Rev. Stat. Ann. tit. 19, §1-103(21) (1973).

father,[55] or a report or acknowledgment by the father of the child's birth as evidenced simply by the appearance of the father's name on the child's birth certificate.[56] Other jurisdictions require a judicial proceeding[57] or an executive decree[58] for legitimation of the child. In some jurisdictions only the marriage of the parents can legitimate a child.[59] Elsewhere, the child can never be legitimated.[60] The result of this diversity in the definition of legitimacy or legitimation is that the proof required to establish the family relationship of parent to legitimate or legitimated child is often no different from the proof which would be offered to establish the family relationship of father to his illegitimate child. Thus, if the alien child Serge

[55]E.g., Ala. Code tit. 27, §11 (1958); Alaska Stat. §25.20.050 (1962); Del. Code Ann. tit. 13, §1301 (1974); Ga. Code Ann. §74-103 (1973); Hawaii Rev. Stat. §338-21 (Supp. 1975); Mich. Comp. Laws §702.83 (1973); N.M. Laws ch. 257, §2-109 (1975).

[56]E.g., *Matter of Jancar*, 11 I&N Dec. 365 (BIA 1965) (law of Yugoslavia); *Matter of K---*, 8 I&N Dec. 73 (BIA 1958) (law of Poland).

[57]E.g., Fla. Stat. Ann. §732.108 (Supp. 1975); Ind. Stat. Ann. tit. 29, §1-2-7 (Burns 1972); N.C. Gen. Stat. §49-10 (1966).

[58]E.g., *Matter of C---*, 9 I&N Dec. 268 (BIA 1961) (law of Italy); *Matter of Mandewirth*, 12 I&N Dec. 199 (BIA 1967) (law of Austria).

[59]E.g., Ark. Stat. Ann. §61-141 (1971); Conn. Gen. Stat. §45-274 (1958); *Matter of Ramirez*, 13 I&N Dec. 666 (BIA 1971) (law of Honduras).

[60]E.g., La. Stat. Ann. (Rev. Stat.) §9.391 (1965) (children whose parents were not free to marry one another at the time of conception); *Matter of Anastasiadis*, 12 I&N Dec. 99 (BIA 1967).

Warner were born in a country where all children are legitimate or where legitimation is achieved by mere parental recognition, then his United States citizen father Cleophus Warner could establish that Serge is his legitimate or legitimated child on the exact same evidence – admission of paternity and the existence of his name on the birth certificate – which he would rely on in part to establish his parentage of his illegitimate son.

As well, claims of maternity are supported and established by the same kinds of evidence that support and establish claims of paternity. Such evidence includes birth certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support and blood tests.[61] See this brief at pp. 42-43, *supra.* Claims of maternity and paternity are equally subjected to the close scrutiny of the immigration and consular officials who evaluate the supporting evidence which is submitted.

[61]The majority below suggested that maternity might be easier to prove than paternity because the mother's name, but not the father's, may appear on the birth certificate. (A at 58) That proposition is both erroneous and irrelevant to this case. In fact, the father's name often does appear on the birth certificate, as in the case of Mr. Warner and Mr. Fiallo. See this brief at pp. 7, 9 *supra.* Also, a mother's name often appears incorrectly on the birth certificate for a variety of reasons. For example, the mother's name on an illegitimate child's birth certificate may reflect the father's surname and not the mother's. Thus, the name of Ramon Martin Fiallo's mother, Celia Michel Rodriguez, appears incorrectly on Ramon's birth certificate as Celia Fiallo. See this brief at n.7 *supra.* There may be in some cases no birth certificate at all. In these various circumstances, the putative mother who seeks to establish her parentage of the child would be required to sustain her burden of proof by means independent

(continued)

4. The Challenged Classifications Are Plainly Irrational When Viewed In Light Of The Asserted Interest In Administrative Convenience.

Therefore, it is clear that problems of proof of parentage, and any attendant potential risks of fraud, are no different for claims of the parent-child relationship of father and illegitimate child than for claims of parent-child relationships which are recognized by the challenged provisions. It is equally clear that the comprehensive administrative procedures and rigorous investigative techniques already devised and applied to deal with claims of parentage generally, and of paternity specifically, are equally available and no less viable in handling claims of parentage made by purported fathers of illegitimate children. In all cases, failure to prove parentage results in denial of the application for the alien's entry into this country. Finally, as observed earlier, elaborate criminal provisions already exist to deal with any fraudulent claims. See this brief, at p. 40, *supra.* In light of these considerations, there can be no doubt of the patent irrationality and invalidity of the challenged provisions in denying, solely on the bases of the gender of the parent and the illegitimate birth status of the child, the plaintiff United States citizens and permanent residents

(footnote continued from preceding page)
of the birth certificate. In any event, even assuming *arguendo* that maternity is easier to prove than paternity, that distinction could not justify the statute's blanket ban on any opportunity to prove paternity of an illegitimate child, while permitting proof of maternity, since failure to sustain the burden of proving either maternity or paternity to the satisfaction of immigration and consular officials results equally in denial of the application.

and their plaintiff alien fathers and children the procedural opportunity which is given to other claimed parents and children to prove the central issue of parentage and the existence of a family unit which it was the exclusive purpose of Congress to preserve. The effective creation of an unwarranted irrebuttable presumption that United States citizens or legal permanent residents and their alien relatives who claim the particular parent-child relationship of father and illegitimate child do not have a family relationship, even if in fact they do, impermissibly transforms a question of mere "burden of proof" (*Glona v. American Guaranty and Liability Insurance Co.*, 391 U.S. 73, 76 (1968)), into an "impenetrable barrier that works to shield otherwise individious discrimination" (*Gomez v. Perez*, 409 U.S. 535, 538 (1973)), and is plainly unconstitutional. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

As this Court observed in *Stanley v. Illinois*, 405 U.S. 645 (1972), in invalidating a state statute which also flatly denied in discriminatory fashion the fundamental procedural due process rights of fathers of illegitimate children,

> . . . the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57.

All that the plaintiff United States citizens and permanent residents seek in this case is their constitutional right to the mere opportunity to establish, on the same terms as are already accorded to other citizens and residents, that they too have parent-child relationships with their plaintiff alien illegitimate children and fathers of illegitimate children. In seeking to secure that basic procedural opportunity, plaintiffs recognize that they too, like other persons who claim a parent-child relationship under the statute, must meet their burden of establishing their claims of parentage to the satisfaction of immigration and consular officials.

POINT IV

THE CHALLENGED PROVISIONS ARE PATENTLY UNCONSTITUTIONAL NOTWITHSTANDING THAT THEY INVOLVE LEGISLATION IN THE IMMIGRATION FIELD.

The federal statutory provisions challenged in this case clearly descend to levels of arbitrariness and offensiveness which are matched by few statutes which have ever come to this Court for constitutional review. Such federal legislation is constitutionally intolerable even though it occurs in the field of immigration.

No other immigration case[62] has come to this Court with the unique coalescing of factors which exist in this case. First, no prior case placed in issue the

[62] *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding abrogation of a treaty by a Congressional statute affecting the admission to this country of Chinese laborers); *Harisiades v. Shaughnessey*, 342 U.S. 580 (1952) (upholding Congressional decision to permit deportation of alien members of Communist Party where legislative history set forth specific Congressional findings that such aliens constituted a threat to this country's national security); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (upholding as not void for vagueness a statutory provision defining the term "psychopathic personality" where legislative history disclosed that Congress specifically intended to include homosexuals within that term and found that homosexuals posed a threat to the general welfare of this country); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding Attorney General's discretionary decision not to admit to this country, because of violation of terms of a prior visa, an alien who was statutorily excludable on a national security ground).

constitutionality of a statute whose exclusive Congressional purpose was primarily to afford rights not to aliens but to United States citizens and legal permanent residents. Where, as here, the rights of United States citizens are at stake, this Court has made it emphatically clear that "no Act of Congress can authorize a violation of the Constitution," even in the field of immigration law. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).[63] Second, none

[63] The challenged provisions would be unconstitutional even if only the rights of aliens were involved here. Both this Court and Congress have recognized that while Congress may have broad power over aliens, the constitutional function of the Court as a co-equal branch of our tripartite government must be exercised equally in a case involving immigration of aliens as in any other case. Cf. *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). The "power to exclude or expel aliens . . . is vested in the political departments of the Government . . . except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene." *Hampton v. Mow Sun Wong*, ____ U.S. ____, 48 L.Ed.2d 495, 508 n.21 (1976); House Report 1365, 82nd Cong., 2d Sess., p.6 (1952). Assuming *arguendo* that Congress has the broad power to determine which group of aliens should be excluded and which should be admitted, once Congress makes those choices, individuals within a particular group cannot constitutionally be subjected to different treatment on the basis of criteria wholly unrelated to any legitimate government interest. See *Francis v. Immigration and Naturalization Service*, 532 F.2d 268 (2d Cir., 1976). Once having determined, under the statutory scheme in question here, that the alien children or parents of United States citizens or legal permanent residents, whether the family relationship be legitimate or illegitimate, are to be admitted to this country without regard to numerical quota or labor certification requirements, Congress cannot constitutionally pick and choose among such relationships solely on the bases of the gender of the parent and the illegitimate birth status of the child.

of the prior cases implicated the fundamental constitutional interests of United States citizens and permanent residents in a familial relationship and association in this country with their parents or children or the privileges or immunities of their citizenship and residency. Third, in none of the unsuccessful immigration cases were essentially procedural due process rights of citizens or legal permanent residents at stake (cf. *Hampton v. Mow Sun Wong*, ____ U.S. ____, 48 L.Ed.2d 495, 520 n.1 (1976) (dissenting opinion)) nor were there presented for review in those cases provisions which discriminate on double-barreled bases of sex and illegitimacy founded on archaic and overbroad stereotypes. Fourth, these prior immigration cases involved foreign policy concerns or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who were specifically and clearly perceived to pose a grave threat to the national security, (*e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)), or to the general welfare of this country (*e.g.*, *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967)). In contrast, this case involves statutory provisions whose exclusive purpose was the generous one of maintaining or reuniting in this country family units which include United States citizen or permanent resident members. Clearly, considerations of foreign policy, national security, or threats to the general welfare of this country played no part in the

enactment of this benevolent and ameliorative legislation.[64]

Each of the unique features which is present here is independently sufficient to distinguish this case from all the prior unsuccessful immigration challenges decided by this Court. Thus, it is manifest that the federal statutory provisions challenged here are not saved from patent unconstitutionality merely because this Court has sustained the exercise of Congressional and executive authority in immigration cases which, upon analysis, bear strikingly little resemblance to this case.

CONCLUSION

For the reasons stated, plaintiffs-appellants respectfully request that this Court reverse and vacate the judgment of the District Court, find that INA §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into INA §201(b) (8 U.S.C.

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[64]The legislative history and the statutory scheme itself disclose that considerations of foreign policy, national security, or threats to the general welfare of this country were not involved in the passage of the provisions challenged herein. It is self-evident that provisions which were intended exclusively to benefit United States citizens and permanent residents by uniting them in this country with their parents and children have no purpose to facilitate the conduct of foreign policy. It is equally clear that the provisions did not rest upon a Congressional determination that "illegitimates" constitute a threat to our national security or welfare, since neither illegitimate children nor their fathers are totally excludable from the United States and other groups of illegitimate children and their unwed parents are accorded the benefits of the statutory right at stake in this case.

§1151(b)) and INA §212(a)(14) (8 U.S.C. §1182(a)(14)) are constitutionality invalid, in violation of the First, Fifth, and Ninth Amendments, and remand this case to the District Court with directions that it (1) issue a permanent injunction against the operation, execution and enforcement of the challenged statutory provisions, (2) determine plaintiffs' motion for class action certification, and (3) order the defendants to afford the plaintiffs the opportunity to establish their claimed family relationships and to grant them whatever immigration status they would have had but for the unconstitutional application of the challenged provisions.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

UNITED STATES STATUTES:

Immigration and Nationality Act §101(b)(1) and (2), (8 U.S.C. §1101(b)(1) and (2)), (66 Stat. 171 (1952), as amended by 71 Stat. 639 (1957), as amended by 75 Stat. 650 (1961), as amended by 79 Stat. 917 (1965), as amended by 89 Stat. 824 (1975)), provides:

(1) The term "child" means an unmarried person under twenty-one years of age who is –

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age eighteen years at the time the marriage creating the status of the stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under his chapter.

(F) a child under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally

saw and observed the child prior to or during adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or complied with the preadoption requirements, if any, of the child's proposed residence: *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Immigration and Nationality Act §201(b), (8 U.S.C. §1151(b)), (79 Stat. 911 (1965)), provides:

The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants, shall be admitted as such, without regard to the numerical limitations in this chapter.

Immigration and Nationality Act §212(a)(14), (8 U.S.C. §1182(a)(14)), (66 Stat. 183 (1952), as amended by 79 Stat. 917-918 (1965)), provides:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, an (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A), (other than the parents, spouses, or children of United States citizens or of aliens, lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 203(a)(8).*

*The United States Code citations for Immigration and Nationality Act §§101(a)(27)(A), 203(a)(3), (6), (8) are 8 U.S.C. §§1101(a)(27)(A), 1153(a)(3), (6), (8), respectively.